It is clear that this power requires a Deptuy Price Controller to specify the area or areas to which the export of textiles is to be controlled or prohibited. And in granting this power to the Deputy Price Controller the legislating authority insisted that that official should not have a general power but that he should be required to specify the areas to which the prohibition or control of export applies. It would be possible for him to specify any number of areas. But specify he must, so that the public may know the specific areas which have been considered and to which the export order applies.

It is clear that in the Order under which the appellant was convicted no areas were specified and that there was a general prohibition of exports. In my opinion this is *ultra vires* section 4A (i) (iii) of the Price Control Proclamation and the appeal must be allowed.

Appeal Allowed.

ARUMUGAM AND ANOTHER v. REX.

[App. Crim. Juris. (Worley, J.) November 16, 1946]

Food Control Proclamation (No. 10 of 1945) Section 15—Foodstuffs Movement Restriction Order (Food Control No. 11 Order) Section 2—Food Control Order No. 13 Order—Appeal on question of fact—Failure to distinguish between defence of persons accused together—Defence of mistake of fact under Section 79 of the Penal Code—Criminal Procedure Code.

The two appellants and another accused person were all members of the police force stationed at Joo Chiat Police Station. On the 9th of June 1946 at 2.30 a.m. they were driving a truck belonging to Joo Chiat Police Station along a road from the sea in the direction of the Police Station. They were eventually charged and convicted on two charges (1) that they had in their possession a controlled article in such circumstances as to raise a reasonable suspicion that an offence under the Food Control Proclamation had been committed or was intended to be committed, an offence under Section 15 of the Food Control Proclamation and (2) that they did move a controlled article without a permit from the Assistant Food Controller, an offence under Section 2 of the Foodstuffs Movement Restriction Order of 1945. It appeared that the third person was the senior of the three Police Officers. He was a detective. The first appellant was an acting detective and the second appellant was merely a driver. The 1st and 2nd appellants alleged that they had acted the whole time under the orders of the third person. The learned District Judge convicted all the accused on both the charges against them and in his grounds of judgment said inter alia "Whatever the value of each separate item of evidence in favour of the accused, the cumulative effect, to my mind, told against them. I therefore convicted the first accused. It follows, therefore, that I must convict the other accused." The first and second appellants, who were the second and third accused in the lower Court, appealed against their conviction and sentence.

Held, (1) that where the evidence discloses a specific offence under the Food Control Proclamation, that offence should be charged and that Section 15, which is intended to cover cases of preparation or where the circumstances are merely suspicious but are not sufficient to prove precisely any specific offence, can only be used as an alternative charge to a charge of another offence under the Food Control Proclamation but not as an additional charge;

(2) that in this case, the conviction under Section 15 of the Food Control Proclamation must be quashed;

(3) that there was no evidence to show that the controlled article was moved from one area to another and therefore the second charge and the conviction thereon should be under the Food Control No. 13 Order and not under the Foodstuffs Movement Restriction Order of 1945;

(4) that in an appeal on a question of fact the appellant has to satisfy the appellate Court that the judgment was against the weight of the evidence;

(5) that there was evidence in this case to show that the second and third accused were acting under the instructions of the third person and that they were acting under a mistake of fact, which was a defence under Section 79 of the Penal Code;

(6) that the learned District Judge had on this point failed to appreciate that the first and second appellants had a separate and distinct defence from that of the third person and that therefore the conviction of the two appellants on the second charge must be quashed.

Cases referred to :—

(1) *Rex v. Ramasamy* (1930) S.S.L.R. 104.

(2) *The Empress of India v. Dayadin* I.L.R. 4 All. 148.

(3) *Sheo Swarup and others v. The King Emperor* (1934) A.I.R. P.C. 227.

(4) *Ong Joo Chin v. Rex* (1946) 12 M.L.J. 1.

MAGISTRATE'S APPEAL.

Mark Morrison for the appellants.

A. W. Bellamy for the Crown.

Worley, J. in an oral judgment said :—In this appeal I had intended to write a judgment but I have not had time to do so. The position is that the two appellants together with a third person who has not appealed were charged and convicted before the Second District Court on two charges, firstly, that they had in their possession at 2.30 a.m. on the 9th of June this year a controlled article namely approximately 4,200 katties of rice, in such circumstances as to raise a reasonable suspicion that an offence under the Food Control Proclamation had been committed or was intended to be committed. That was a charge under section 15 of the Food

Control Proclamation No. 10 of 1945, and further they were charged that at the same time and place they did move a controlled article namely, approximately 4,200 katties of rice without a movement permit from the Assistant Food Controller, an offence under section 2 of the Foodstuffs Movement Restriction Order of 1945 of Food Control No. 11 Order and punishable under the Food Control Proclamation. There was a third charge against the third person but that is not relevant to this appeal.

Now the facts, shortly, were that the two appellants and the 3rd person were all members of the police force stationed at Joo Chiat Police Station and that at the time specified in the charge they were driving a truck belonging to Joo Chiat Police Station along a road from the sea in the direction of the Police Station and in that truck there were 4,200 katties of rice and six coolies. They were stopped by other police officers who had been in hiding, observing the movements of this police truck, and were taken to Joo Chiat Police Station and as a result of further investigations, they were faced with these charges.

On the appeal, first of all, objection was made to the second charge, that it did not disclose an offence because the section of the Foodstuffs Movement Restriction Order under which the charge was brought makes it an offence to move a controlled article from one area to another and the charge did not allege that the controlled article was being moved from one area to another without a permit. Counsel for the Crown admitted that the charge as framed could not stand but pointed out that the movement of rice, without any reference from one area to another, was restricted by the Food Control No. 13 Order dated 5th March 1946 and that the second charge could and should have been framed under that order. Under the powers given by the Criminal Procedure Code I am competent to amend a charge in an appeal of his sort and I do amend this second charge. It appears to me there can be no injustice done. Neither of the appellants nor the third person can have been under any misapprehension as to the substance of the offence with which they were being charged. They have not suffered any prejudice. The objection to the charge is a technical one and I feel no hesitation in substituting for the second charge a charge under Food Control No. 13 Order. But then there is a second point in connection with the charges, submitted by Counsel for the Crown, that it is wrong to combine a charge under section 15 of the Food Control Proclamation with a charge such as that which forms the subject of the original second charge or which forms the subject of the substituted second charge. Mr. Bellamy argued, and I agree with him, that if the evidence discloses a specific offence under the Food Control Proclamation, that offence should be charged and that it is not competent to the prosecution to add a charge under section 15 which is, I think, an "umbrella" section intended to cover cases of preparation or where the circumstances are merely suspicious but are not sufficient to prove precisely any specific offence. It would be quite proper, I think, for the prosecution to use section 15 as an alternative charge to a charge of another offence under the Food Control Proclamation but not to use it as an additional charge. I therefore quash the conviction of the two appellants on the first charge and also, in exercise of my powers of revision under the Criminal Procedure Code, quash the conviction of the third person, Yeong Kok Leong, who has not appealed. I do not know what his position is, I am told he has absconded, but it is only right that the record should be amended by striking out his conviction on the first charge.

It remains for me to consider the appeal of these two appellants against their conviction on the second charge. Their argument in substance is that the learned Disrict Judge misdirected himself by failing to distinguish their defences from the defence of the third person who was charged with them. That third person was the senior of the three police officers. He was a detective. The first appellant here was an acting detective and the second appellant was merely a driver.

The defence of the third person was that he had received information that a quantity of rice was going to be unloaded or desposited by smugglers on the sea coast at Siglap and, acting on that information, had taken the police lorry to the scene and called on the two appellants to go with him. Their defence was that they had acted the whole time under the orders of this third person.

Now on the evidence I have no doubt that there were sufficient grounds on which the Magistrate, if he had directed his mind properly to the case of each of the three accused persons, could reject that defence and find them guilty of the matter charged.

In the course of the argument, Counsel for the Crown in referring to the functions of an appellate Court referred me to the case of *Rex. v. Ramasamy*[1]

where Sir William Murison citing *The Empress of India v. Dayadin*[2] accepted as applicable to the Colony the following statement of law :—

> Findings of fact in criminal cases, which are appealed from, should not be interfered with unless there has been such stupidity and perversity, by the trial judge, or, that he has so obstinately blundered, or gone wrong, that a miscarriage of justice has occurred.

I do, with great respect to Sir William Murison, say that that criterion can no longer be accepted in view of the decision of the Privy Council in the case of *Sheo Swarup and others v. The King Emperor*[3]. The only report I have been able to find of this case is in volume 78 of the Solicitors' Journal 1934 under the date of the 25th of August 1934. The Privy Council was dealing with an appeal by Sheo Swarup and five others from a judgment of the Allahabad High Court reversing a judgment of a lower court which had acquitted the appellants. On the appeal their Lordships' opinion was that there was "no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court had no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower court had "obstinatedly blundered", or had "through incompetence, stupidity, or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice," or had in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or had been tricked by the defence so as to produce a similar result. The relevant sections of the Criminal Procedure Code gave to the High Court full power to review at large the evidence on which the order of acquittal was founded, and to reach the conclusion that on the evidence the order of acquittal should be reversed."

Actually I think the case of *Dayadin* was a case of an appeal from an acquittal and the case which Sir Willam Murison was dealing with was also an acquittal. In such a case the Privy Council has ruled that these dicta of the Indian Courts are wrong so we can no longer accept Sir William Murison's dicta in *Ramasamy's case* as being good law.

There are other reported local cases on the function of the Appellate Court of the Colony in dealing with findings of fact which I referred to myself in the case of *Ong Joo Chin v. Rex*[4]. I think I need not go further into the matter except to say, as I said in that case, that the proper criterion is that the appellant on questions of fact has to satisfy the Appellate Court that the judgment was against the weight of the evidence and that I think must be the test whether it is an appeal against an acquittal or against a conviction.

I would not in this case be prepared to disagree with the learned District Judge's findings of fact if he had applied those findings of fact clearly and separately to the case of the three accused persons, but I do feel he has misdirected himself by failing to distinguish between the defence of these two appellants and the defence of the third person.

In his very careful grounds of judgment, it is clear that the learned District Judge considered the case very thoroughly but there are passages which lead me to the conclusion I have already stated. In the first place I notice that in referring to the defence of the third person, that is, the police detective, he says, "It is a likely story: but it is a story which I rejected after a careful consideration of the whole evidence." I do not quite know what the learned District Judge means by the phrase "a likely story", but it seems to me the most usual meaning is that it is a probable story and that would seem to indicate that the appellants had succeeded in rebutting the case for the Prosecution at any rate to the extent of putting up a story which the learned District Judge regarded as "probable" and, if they had done so, according to the principles of the criminal law, the defence had discharged the onus laid upon them. But I think the learned District Judge must have meant that it was a plausible story because he goes on to say he did reject it after a consideration of the whole of the evidence. Then a little later on in the judgment he says that the Prosecution has shown that suspicion had already existed before as to the movements of the Joo Chiat police truck. I think that can only refer to the passage in the evidence of A.S.P. Shannon that he received information early in June and as a result of that gave instructions that this truck should be kept under observation. On that I remark that there was no evidence that either of these two appellants had been seen or had anything to do with the movements of the truck before the actual time and date specified in the charge, in fact the second appellant said that he was only put on the duty of driving the truck about three days before his arrest, and it does seem to me that this evidence of the previous information and the previous suspicion of the police has rather tended to prejudice these two appellants in the mind of the learned District Judge. But the passage in the judgment which is most important is the District Judge's conclusion

that having convicted the first accused it followed that he must convict the other two accused. He says, "Whatever the value of each separate item of evidence in favour of the accused, the cumulative effect, to my mind, told against them. I therefore convicted the first accused. It follows therefore, that I must convict the other accused.

Mr. Bellamy suggested that that finding was correct because it was a question of joint possession, that there was absolute prohibition of the possession of the controlled article and that if the three persons were found, in fact, in possession of the controlled article, then the conviction must automatically follow. That point is now irrelevant because the charge alleging possession has been struck out. But I should remark in passing that I am not prepared to accept in full the proposition put forward by Counsel for the Crown. As I put it to him in the course of the argument, if a police officer hears of a case of smuggling and seizes the smuggled controlled article, does he thereby commit an offence? Mr. Bellamy said, "He does but would not be prosecuted for it." But the point is now irrelevant as the first charge is struck out. It now remains to consider whether, under the second charge, the conviction of the two appellants must automatically follow the conviction of the third person who has not appealed.

The second charge is moving a controlled article without a written authorisation of the Deputy Food Controller. I do not think it can be contended that every person concerned in the movement of a controlled article must automatically be convicted of an offence. Is the paid driver of a lorry expected to inquire of his employer, when he is asked to move rice, whether the employer has a written authorisation for moving the goods? It seems to me to be going too far to say that the driver is put on inquiry to ascertain, in carrying out the instructions of his employer, that the movement is authorised by the Food Controller.

In the present case the rice was unquestionably moved at the instance of this third person, Yeong Kok Leong, and there was, as I have indicated, ample evidence to justify his conviction. These two appellants admitted that they were on the lorry and physically moved the rice but they contended that they were acting under the instructions of this third person. Their evidence was that he came to them and said: "I have got a case. Come with me on the lorry". That seems to me, in effect, a plea of justification under section 79 of the Penal Code that they were acting under a mistake of fact. That section provides that nothing is an offence which is done by any person who is justified by law or who by reason of a mistake of fact in good faith believes himself to be justified by law in doing it. It seems to me that the issue for the learned District Judge in the case of these two appellants was, Were they sincerelv mistaken in fact in thinking that the third person was acting bona fide and the passage in the judgment to which I have referred indicates that the learned District Judge did not address his mind to it. If the third person deceived them and they acted in good faith they would be entitled to an acquittal and it would not necessarily follow that because the third person was convicted that they also should be convicted. I cannot say, particularly with regard to the second appellant, whether if the District Judge had addressed his mind to that point, he would have convicted him or not. The second appellant gave evidence that he was the driver of this lorry. The Chinese detective came out and gave him instructions to get the lorry ready and drive it out and so on. As I have said, I think the learned District Judge has failed to appreciate that in that evidence, and equally in the evidence of the 1st appellant, there is a separate and distinct defence from that of the third person.

I feel obliged to allow the appeal and quash the convictions and sentences of the two appellants on the second charge.

Appeal Allowed.

[The above judgment was approved and signed by Worley J. before he left the Colony. Editor M.L.J].